Supreme Court, U.S.
FILED
OCT 28 1996
CLERK

(2)

No. 96-475

In The

Supreme Court of the United States

October Term, 1996

AMRIT LAL,

Petitioner,

vs.

BOROUGH OF KENNETT SQUARE,

Respondent.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

JOHN L. HALL
Counsel of Record
GAWTHROP GREENWOOD & HALSTED
A Professional Corporation
Attorneys for Respondent
119 North High Street
West Chester, Pennsylvania 19381-0562
(610) 696-8225

9845
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

37 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petitioner's failure to file a timely petition for allocatur to the Pennsylvania Supreme Court leaves your Honorable Court without jurisdiction to consider the Petition.

2. Whether the tangle of constitutional issues now raised by Petitioner, considered and rejected by the Commonwealth Court of Pennsylvania, in any way justifies a grant of certiorari.

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Opinions and Judgments of the Courts Below	1
I. Instant Appeal	1
II. Related Cases	2
Counterstatement of Jurisdiction	3
Counterstatement of Case	3
I. Case History	3
II. Petitioner's Misstatement of Fact	8
Reasons for Denying the Writ	12
I. The Petition Does Not Arise From A Final Judgment Or Decree From The Highest Court Of The State From Which An Appeal Could Be Had, And Your Honorable Court Therefore Has No Jurisdiction.	12
II. Assuming Jurisdiction Exists, Petitioner Has Raised No Legitimate Constitutional Issues, And The Petition For Certiorari Should Therefore Be Denied.	15

Contents

		Page
A.	Fourteenth Amendment — Adequacy of Respondent's Property Maintenance Ordinance.	15
B.	Eighth Amendment — Excessive Fines ...	19
C.	Fifth Amendment — Double Jeopardy ...	21
D.	Sixth Amendment — Right To Counsel ...	22
E.	Fourteenth Amendment — Due Process/ Election Of Remedies	25
Conclusion		28

TABLE OF CITATIONS

Cases Cited:

Bacik v. Commonwealth, 434 A.2d 860 (Pa. Cmwlth. 1981), *appeal dismissed,* 456 U.S. 967 (1982) 23

Borough of West Chester v. Lal, 426 A.2d 603 (1981) .. 26

Chicago v. Miller, 188 N.E. 2d 694 (Ill. 1963), *appeal dismissed,* 375 U.S. 11 (1963) 16

Clark v. Pennsylvania, 128 U.S. 395 (1888) 12

Contents

	Page
Commonwealth, Department of Environmental Protection v. Pennsylvania Power Company, 384 A.2d 273 (Pa. Cmwlth. 1978), *rev'd and remanded on other grounds*, 490 Pa. 399	27
Commonwealth v. Gray, 608 A.2d 534 (Pa. Super. 1992)	25
Commonwealth v. Howard, 353 A.2d 438 (Pa. 1976)	24
Commonwealth v. Kizbach, 373 A.2d 118 (Pa. Super. 1976)	24
Commonwealth v. Novak, 150 A.2d 102 (Pa. 1959)	25
Commonwealth v. Smith, 275 A.2d 98 (Pa. 1971)	24
Dente v. Mt. Vernon, 50 Misc. 2d 983, 272 N.Y.S. 2d 65 (1966)	16
Fisher v. Perkins, 122 U.S. 522 (1887)	13
Henley v. Zoning Hearing Board of West Fallowfield Township, 625 A.2d 132 (Pa. Cmwlth. 1992)	18
Holland Enterprises, Inc. v. Joka, 439 A.2d 876 (Pa. Cmwlth. 1982)	18
Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968)	12
Jordan v. Gore, 431 A.2d 300 (Pa. Super. 1981)	22

Contents

	Page
Louisville v. Thompson, 339 S.W. 2d 869 (Ky. 1960) ...	16
Newark v. Charles Realty Company, 86 A.2d 33 (N.J. Super. 1952)	16
Nuside Metal Products, Inc. v. Eazor Exp. Inc., 152 A.2d 275 (Pa. Super. 1979)	26
Paquette v. Fall River, 155 N.E. 2d 775 (Mass. 1959) ..	16
Pawk v. Commonwealth, Department of Environmental Resources, 395 A.2d 692 (Pa. Cmwlth. 1978)	27
Phillips v. Borough of Folcroft, 403 A.2d 194 (Pa. Cmwlth. 1979)	15
Pickwick Realty Co. v. Housing Appeals Board, 12 Ohio Misc. 245, 232 N.E. 2d 427 (Ohio 1965)	16
Pittsburgh Union Stockyards Co. v. Pittsburgh Joint Stockyards Co., 163 A. 668 (Pa. 1933)	26
Re: Right of Way for Legislative Route 1023, 406 A.2d 819 (Pa. Cmwlth. 1979)	25
Richards v. Colombia, 88 S.E. 2d 683 (S.C. 1955)	16
R.S. Construction Company v. Baltimore, 309 A.2d 629 (Md. 1973)	16

Contents

Page

Simpson v. Equitable Life Assurance Society of the United States, 193 A. 309 (Pa. Super. 1937) 27

Spear v. Ward, 74 So. 27 (Ala. 1917) 16

St. Louis v. Nash, 260 S.W. 985 (Mo. 1924) 16

State v. Schaffel, 229 A.2d 552 (Conn. Cir. 1966) 16

Stratton v. Stratton, 239 U.S. 55 (1915) 13

Tenement House Department of Moeshen, 72 N.E. 231 (N.Y. 1904), *aff'd*, 203 U.S. 583 (1906) 16

Thornbury Township v. Lal, No. 872 C.D. 1994, 653 A.2d 720 (Pa. Cmwlth. January 12, 1995) 6, 19, 22, 23

United States v. Rankin, 779 F.2d 956 (3d Cir. 1986) ... 25

Zanotto v. Commonwealth, Department of Transportation, 475 A.2d 1375 (Pa. Cmwlth. 1984) . 22

Statutes Cited:

42 Pa. C.S.A. § 9726(a) 20

53 P.S. § 4104 17

53 P.S. § 46202(24) 17, 26

53 P.S. § 48301 26

Contents

	Page
53 P.S. § 48308	26
28 U.S.C. § 1257(a)	3, 12
United States Constitution Cited:	
Fifth Amendment	21
Sixth Amendment	22
Eighth Amendment	19
Fourteenth Amendment	15, 25
Rules Cited:	
Pa. R.A.P. 907(b)	13
Pa. R. C. P. 216	24
Pa. R.C.P. 216(A)	24
Pa. R.C.P. 216(C)	24
C.C. R. Crim. P. 301(a)(1)	24
Pa. R. Crim. P. 1410(D)	7
Other Authorities Cited:	
McQuillin Mun. Corp., § 18.02 (3d Ed)	18

Contents

	Page
McQuillin Mun. Corp., § 24.504 (3d Ed)	16
McQuillin Mun. Corp., § 24.507 (3d Ed)	16
P.L.E., *Election of Remedies*, §§ 3 and 4	26

Respondent Borough of Kennett Square ("Respondent") respectfully requests that your Honorable Court deny the petition of Amrit Lal ("Petitioner") for a writ of certiorari to review the decision and order of the Commonwealth Court of Pennsylvania, as the petition does not arise from a final judgment or decree from the highest court of the state from which an appeal could be had, and as the petitioner presents no legitimate constitutional issues arising from the decisions below.

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

The following is a list of the pertinent lower court proceedings.

I. Instant Appeal:

Borough of Kennett Square v. Lal (Kennett Square III), 665 A.2d 15 (Pa. Cmwlth. 1995) (affirming trial court decision finding Amrit Lal guilty of Borough Property Maintenance Code violations, and, due to Lal's frivolous appeal and continued abuse of judicial proceedings, remanding for imposition of costs, fees and damages against Lal), *petition for permission to file allocatur petition nunc pro tunc denied,* No. 211 E.D. Misc Docket 1995 (Pa. December 20, 1995), *motion for reconsideration denied,* No. 211 E.D. Misc Docket 1995 (Pa. February 20, 1996), *application for extension of time to file petition for writ of certiorari granted,* Application No. A-963 (U.S. May 23, 1996), *petition for writ of certiorari returned for failure to comply with court rules,* letter of William K. Suter, Clerk of Court (U.S. July 22, 1996), *petition for writ of certiorari placed on docket,* No. 96-475 (U.S. September 26, 1996).

II. Related Cases:

Borough of Kennett Square v. Lal (Kennett Square II), 645 A.2d 474 (Pa. Cmwlth. 1994) (affirming default judgment against Amrit Lal in equity action, affirming trial court's appointment of agent to manage Lal's apartment complex and correct violations, and, due to Lal's frivolous appeal designed to obstruct the equitable relief, remanding for imposition of attorney's fees against Lal), *allocatur denied*, 656 A.2d 119 (Pa. 1995).

Borough of Kennett Square v. Lal (Kennett Square I), 643 A.2d 1172 (Pa. Cmwlth. 1994) (affirming Amrit Lal's conviction for violating Borough Property Maintenance Code provisions), *allocatur denied*, 655 A.2d 517 (Pa. 1994).

Amrit Lal v. Borough of Kennett Square, Kenneth Roberts, as President of the Borough Council, Council Members J. McCarthy, C. Merrick, M. Piergalline, J. Scalise and T. Zunino, Mayor C.S. Cramer, Douglas Marguriet, Borough Manager, Charles Warner, Code Enforcement Official, Albert McCarthy, Chief of Borough Police, John L. Hall, Associate Solicitor, Mark Tunnell, Assistant Solicitor and John Halsted, Solicitor to the Borough, Government of Chester County, Commissioners Joe Kenna, A. Dinneman and K. Martynick, Marita Hutchinson, Property Manager and Agent for Hon. Thomas G. Gavin and Joseph R. Pitts, Legislative Representative from Kennett Square, in their official and individual capacities, No. 95-7938, (U.S. Dist. Ct., E.D. Pa. July 25, 1996) (Ditter, J., dismissing Amrit Lal's civil rights, RICO and state law-based claims, and imposing sanctions as "Lal's complaint was filed for the improper purpose of harassing the defendants, and is not warranted by existing law or a nonfrivolous argument for its extension or reversal." Slip. op. at 3), *appeal filed*, No. 96-1772 (3d Cir. October 1, 1996), *motion for stay of enforcement*

of sanctions and attorneys' fees denied, No. 96-1772 (3d Cir. October 21, 1996).

COUNTERSTATEMENT OF JURISDICTION

Although Petitioner alleges jurisdiction pursuant to Title 28, Section 1257(a) of the United States Code, 28 U.S.C.S. § 1257(a) (Law. Co-op. 1988 & Supp. 1996), your Honorable Court is without jurisdiction to hear this case. Following the August 11, 1995 issuance of the decision and order of the intermediate appellate court, *Borough of Kennett Square v. Lal (Kennett Square III)*, 665 A.2d 15 (Pa. Cmwlth. 1995), and the September 13, 1995 denial of reargument, the Petitioner failed to file a timely petition for allocatur to the Pennsylvania Supreme Court. The instant petition for certiorari therefore does not arise from a final judgment or decree from the highest court of the state from which an appeal could be had.

COUNTERSTATEMENT OF CASE

I. Case History

The Petitioner, Dr. Amrit Lal, Ph.D., J.D., (N.T. 6/6/94, p. 18; 6/7/94, p. 134, 148)[1], is the owner of an apartment complex known as Scarlett Manor Apartments, situated in the Borough of Kennett Square, Pennsylvania. The Borough is the instant respondent. This complex consists of two separate buildings containing 18 apartments in each building for a total of 36 units. (N.T. 6/6/94, p. 29). The complex's severe state of disrepair resulted in earlier cases upholding the Respondent's right to enforce its property maintenance ordinance, *Borough of Kennett Square v. Lal (Kennett Square I)*, 643 A.2d 1172 (Pa.

1. "N.T." indicates transcripts of trial court proceedings in the Court of Common Pleas of Chester County, Pennsylvania before the Honorable Thomas G. Gavin.

Cmwlth. 1994), *allocatur denied*, 655 A.2d 517 (Pa. 1994), and approving of the appointment of an agent to ensure adequate maintenance of the property. *Borough of Kennett Square v. Lal (Kennett Square II)*, 645 A.2d 474 (Pa. Cmwlth. 1994), *allocatur denied*, 656 A.2d 119 (Pa. 1995).

The current case developed on or about August 31, 1992 when the Borough Code Enforcement Officer and Manager, Douglas Marguriet, (N.T. 6/6/94, pp. 21-22) inspected the complex and subsequently prepared and mailed a notice of violation letter dated September 24, 1992. The September 24, 1992 letter was six pages in length and described numerous violations throughout the apartment complex. (N.T. 6/6/94, p. 30).

Following a re-inspection conducted on December 23, 1992, Mr. Marguriet sent Petitioner a second notice of violation letter dated December 30, 1992, notifying him of further property maintenance code violations. (N.T. 6/6/94, pp. 30-31). Instead of making the necessary repairs, Petitioner filed an internal appeal to the Borough of Kennett Square Building and Fire Appeals Board which scheduled a hearing on the violations for February 16, 1993. During the hearing, Mr. Marguriet testified and presented photographic evidence supporting the violations. (N.T. 6/6/94, pp. 31-32). On February 22, 1993, the Building and Fire Appeals Board issued an opinion finding the evidence of violations overwhelming and, by order, dismissed and denied Petitioner's appeal. (N.T. 6/6/94, pp. 77-78).

The issuance of the Building and Fire Appeals Board's Opinion and Order was followed by a re-inspection on March 24 and March 27, 1993. During that inspection, violations which were listed in the September 24, 1992 and December 30, 1992 notice of violation letters were found uncorrected. Consequently, the twenty-four (24) citations which are the subject of the instant appeal were issued.

The citations were consolidated for a summary trial before District Justice Martin in Kennett Square District Court 15-3-04. A summary trial was held on July 2, 1993, following which Dr. Lal was convicted and sentenced to pay the maximum fine of $1,000 for each violation. (N.T. 6/7/94, p. 113). Thereafter, Petitioner filed an appeal to the Chester County Court of Common Pleas which assigned separate case numbers to each citation, and consolidated them for trial before the Honorable Thomas G. Gavin.

Prior to trial, on March 29, 1994, Petitioner filed a "Petition for Summary Dismissal," alleging that due to the "extraordinary relief provided Kennett Borough by the Court [presumably in the final equity decree issued by Judge Gavin and reviewed by the Commonwealth Court, *Borough of Kennett Square v. Lal (Kennett Square II)*, 645 A.2d 474 (Pa. Cmwlth. 1994), *allocatur denied*, 656 A.2d 119 (Pa. 1995)], it is no longer necessary to beat a dead horse or engage in overkill." This Petition was denied by the Court on March 31, 1994, following which, on or about April 11, 1994, Petitioner began a sub-stream of litigation by filing a Petition for Review in the Commonwealth Court. By Order dated April 21, 1994, the Commonwealth Court transferred the Petition for Review to the Supreme Court of Pennsylvania.[2]

On April 13, 1994, the parties appeared before Judge Gavin for the scheduled trial *de novo*. Initially, Petitioner, through his trial attorney, R. Kerry Kalmbach, moved that Judge Gavin recuse himself. (N.T. 4/13/94, pp. 2-4). After the Court denied the recusal motion, and in response to the Court's inquiry, Petitioner confirmed that he was alleging Mr. Kalmbach's

---

2. On July 7, 1994, the Pennsylvania Supreme Court denied Lal's Petition for Review. On or about July 18, 1994, Lal filed a Petition for Reconsideration in the Supreme Court. The Petition for Reconsideration was denied by the Supreme Court on August 30, 1994.

ineffectiveness in similar municipal violation cases then pending before the Commonwealth Court. *Borough of Kennett Square v. Lal (Kennett Square I)*, 643 A.2d 1172 (Pa. Cmwlth. 1994), *allocatur denied*, 655 A.2d 517 (Pa. 1994); *Thornbury Township v. Lal*, No. 872 C.D. 1994, 653 A.2d 720 (Pa. Cmwlth. January 12, 1995). Mr. Kalmbach revealed that he was not aware of Petitioner's ineffectiveness claims and promptly withdrew as counsel from the case. (N.T. 4/13/94, pp. 9-10). Thereafter, the court continued the cases until April 29, 1994 informing Petitioner that if he did not have substitute counsel at that time he must be prepared to proceed as his own counsel. (N.T. 4/13/94, pp. 10-11).

When the court reconvened on April 29, 1994, Petitioner asserted that the court lacked jurisdiction due to the pending Petition for Review. (N.T. 4/29/94, pp. 2-4). Following the court's rejection of this argument, Petitioner made a second motion for recusal. (N.T. 4/29/94, pp. 5-7). The court denied this second recusal motion. After the start of the Borough's case, Petitioner requested a continuance to acquire counsel. The court again granted Petitioner's motion continuing the matter, this time until June 6, 1994, on which date the court stated that there would be no further continuances. (N.T. 4/29/94, pp. 8-11).

On June 6, 1994, the court found that Petitioner had filed a written Petition for Recusal on June 3, 1994. Additionally, and in disregard of the Court's previous instruction to Petitioner that motions to the court must be made in writing before the trial date (N.T., 6/6/94, pp. 10, 17), Petitioner made the following oral motions: motion for continuance to seek counsel (N.T. 6/6/94, pp. 4, 18-19), motion that the court lacked jurisdiction due to the pending Petition for Review (N.T. 6/6/94, pp. 10-15), motion for dismissal due to the absence of an effective date on the municipal ordinance adopting the BOCA property

maintenance code (N.T. 6/6/94, pp. 15-16, 20-24), motion that the ordinance is unconstitutional (N.T., 6/6/94, pp. 16-17), motion that the citations constitute double jeopardy (N.T. 6/6/94, pp. 17-18). Following the denial of these motions, evidence was taken on the merits of the citations.

The trial was completed on June 7, 1994 following which the Petitioner was found guilty of all citations and immediately sentenced. The fines ordered by the court to be paid by Petitioner ranged from the minimum $300 amount to the $1,000 maximum amount. (N.T. 6/7/94, pp. 134-145).

On June 17, 1994, the Petitioner filed a Motion to Vacate the Sentences and a Request for New Trial. To ensure the Petitioner's right to allocution, and although the motion was in violation of Pa. R.Crim. P. 1410(D), the Respondent consented to a vacation of sentences which the court ordered on June 23, 1994. On July 5, 1994, Petitioner's newly hired attorney, Thomas A. Pitt, Jr., requested that the resentencing hearing be continued to permit counsel to submit a memorandum of law on the issues raised in the Motion for New Trial. This request was granted.

On August 11, 1994, oral argument was held, following which the Motion for New Trial was denied. Sentencing, however, was continued in order to give the parties an adequate opportunity to settle the matter if possible.

When the parties reconvened for sentencing on September 7, 1994, the court reimposed the sentences which it had originally imposed on June 7, 1994. At Petitioner's request, the Court granted him sixty (60) days to pay all fines and costs. (N.T. 9/7/94, pp. 17-18). On October 6, 1994, Petitioner filed a notice of appeal to the Commonwealth Court. Following the filing of the notice of appeal, Petitioner filed a motion for

supersedeas to stay the payment of fines, first to the lower court and later with the Commonwealth Court, both motions being denied by the respective courts.

The Commonwealth Court affirmed the trial court's decision in *Borough of Kennett Square v. Lal (Kennett Square III)*, 665 A.2d 15 (Pa. Cmwlth. 1995) and further remanded the case, *sua sponte*, for imposition of costs, fees and damages against the Petitioner. In doing so, the Commonwealth Court stated that "Lal has failed to heed the Court's earlier admonitions and efforts to end his abuses of the judicial process through repeated filings and frivolous appeals." 665 A.2d at 20. Such warnings were given in *Kennett Square II, supra*, and *Thornbury Township, supra*.

As further explained in the argument section of this brief, *infra*, Petitioner failed to file a timely allocatur petition before the Pennsylvania Supreme Court. Following this failure, he filed a petition for permission to file an allocatur petition *nunc pro tunc*, which was denied at No. 211 E.D. Misc. Docket 1995 (Pa. December 20, 1995), and then a motion for reconsideration which was also denied, at No. 211 E.D. Misc. Docket 1995 (Pa. February 20, 1996).

Petitioner then made an application for extension of time to file petition for writ of certiorari to your Honorable Court which was granted at Application No. A-963 (U.S. May 23, 1996). However, when he finally filed his petition, it was returned for failure to comply with court rules. Letter of William K. Suter, Clerk of Court (U.S. July 22, 1996). Following Petitioner's corrections, the petition for writ of certiorari was placed on the docket at No. 96-475 (U.S. September 26, 1996).

II. Petitioner's Misstatement of Fact.

The Petitioner's statement of the case is replete with

factual misstatements and inaccuracies. The most important of these are noted for your Honorable Court's reference.

First, Petitioner provides no citation or source for the allegation that the Respondent has engaged in a "selective enforcement mission" against the Petitioner for his myriad of housing code violations. Petition at 3. Indeed, this is because no reference is available, as the trial court received no evidence of substance concerning any supposedly discriminatory treatment. (N.T. 6/7/94, pp. 127-132). The Petitioner's apparent belief is that if he makes an allegation enough times, it will stick. The Commonwealth Court below properly recognized the repetitive and frivolous nature of the Petitioner's appeals as sanctionable, *Kennett Square III, supra,* 665 A.2d at 20, as did the same court in *Kennett Square II, supra,* 645 at 480-481. Of similar import is the recent decision of Judge Ditter of the U.S. District Court for the Eastern District of Pennsylvania, *Amrit Lal v. Borough of Kennett Square, et al.,* No. 95-7938, (U.S. Dist. Ct., E.D. Pa. July 25, 1996), *appeal filed,* No. 96-1772 (3d Cir. October 1, 1996), *motion for stay of enforcement of sanctions and attorneys' fees denied,* No. 96-1772 (3d Cir. October 21, 1996), in which the court dismissed the Petitioner's civil rights, RICO and state law-based claims, and imposed sanctions against the Petitioner because his "complaint was filed for the improper purpose of harassing the defendants, and is not warranted by existing law or a nonfrivolous argument for its extension or reversal." Slip. op. at 3).[3]

---

3. The full case caption of the action before Judge Ditter evidences the Petitioner's slash-and-burn technique of litigation: *Amrit Lal v. Borough of Kennett Square, Kenneth Roberts, as President of the Borough Council, Council Members J. McCarthy, C. Merrick, M. Piergalline, J. Scalise and T. Zunino, Mayor C.S. Cramer, Douglas Marguriet, Borough Manager, Charles Warner, Code Enforcement Official, Albert McCarthy, Chief of Borough Police, John L. Hall, Associate Solicitor, Mark Tunnell, Assistant Solicitor* (Cont'd)

Similarly, Petitioner attempts to mislead your Honorable Court with the following statement:

> Petitioner took appeal of this sentence to the Commonwealth Court of Pennsylvania, alleging inter alia, excessive fines, double jeopardy, and oppressive enforcement of the borough's code.

Petition at 5. In reality, the Petitioner appealed to the Commonwealth Court only on the issues of "whether [Petitioner] was proven guilty of the summary offenses beyond a reasonable doubt and whether the evidence was sufficient to sustain a conviction." *Kennett Square III, supra,* 665 A.2d at 16. Despite the limited appeal taken, Petitioner then proceeded to raise the tangle of putative constitutional issues within his Commonwealth Court brief. The Commonwealth Court recognized Respondent's objection on the grounds of waiver, but addressed several constitutional questions "given the nature of this matter." 665 A.2d at 16. The court then denied all constitutional claims, and found the nature of the Petitioner's matter as being nothing but frivolous. *Id.* at 20.

As to the separate equity matter, suffice it say that Petitioner has distorted the foundation and import of the order appointing an agent to oversee operation of Petitioner's most notorious real estate complex. An accurate description of the facts is found at *Borough of Kennett Square v. Lal (Kennett Square II), supra,* 645 A.2d 474.

(Cont'd)

and John Halsted, Solicitor to the Borough, Government of Chester County, Commissioners Joe Kenna, A. Dinneman and K. Martynick, Marita Hutchinson, Property Manager and Agent for Hon. Thomas G. Gavin and Joseph R. Pitts, Legislative Representative from Kennett Square, in their official and individual capacities.

Petitioner's factual statement relies on the supposed *de minimis* nature of the property maintenance code violations. In fact, the trial court judge reduced the fines for the more minor violations. For instance, the judge reduced a $1000 fine to $300 in the case of broken window glass ("Again this is one of those annoying little matters that probably entail a couple of dollars worth of glass and a couple dollars worth of labor and it goes uncorrected for a period of seven months." N.T. 6/7/94, pp. 139). However, many violations were more substantial, and in those cases the judge imposed the full $1000 citation ("Exhibit B-6. . . shows a bathroom that is deplorable when one has in mind that the tenant had to endure a hole in the ceiling that based on this photograph approximated 18 inches to 24 inches by at least three feet for a period from September of '92 through March of '93. No one has to live like that. A major hazard. A fine of $1,000.00 together with the costs of prosecution." N.T. 6/7/94, pp. 137).

Finally it must also be noted that Petitioner references his federal action, *Amrit Lal v. Borough of Kennett Square, et al., supra*, without acknowledging Judge Ditter's dismissal of the case and imposition of sanctions on July 25, 1996. Petition at 9. This lack of candor to the tribunal is inexcusable as Petitioner's "corrected" petition was placed on your Honorable Court's docket on September 26, 1996, a full two months after the federal case was dismissed. Curiously, Petitioner only mentions cryptically that "the case is now on appeal." Petition at 9.

REASONS FOR DENYING THE WRIT

I.

THE PETITION DOES NOT ARISE FROM A FINAL JUDGMENT OR DECREE FROM THE HIGHEST COURT OF THE STATE FROM WHICH AN APPEAL COULD BE HAD, AND YOUR HONORABLE COURT THEREFORE HAS NO JURISDICTION.

The Petitioner has stated that his petition for writ of certiorari is brought pursuant to Title 28, Section 1257(a) of the United States Code, which provides in pertinent part that such a petition may be reviewed if it arises from "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had." 28 U.S.C.S. § 1257(a) (Law. Co-op. 1988 & Supp. 1996). While it is generally recognized that your Honorable Court may review the judgment of an inferior state court where the state's highest court has denied appeal, *see, e.g., Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676 (1968); *Clark v. Pennsylvania,* 128 U.S. 395 (1888), the Petitioner's instant request for review does not fit within the general rule, and the Petition should therefore be denied.

In the instant case, the petition arises from the opinion and order of the Commonwealth Court of Pennsylvania, one of Pennsylvania's two intermediate appellate courts. *Borough of Kennett Square v. Lal (Kennett Square III),* 665 A.2d 15 (Pa. Cmwlth. 1995) Petitioner, however, failed to file a timely petition for allocatur with the Pennsylvania Supreme Court according to the Pennsylvania Rules of Appellate Procedure. His subsequent attempts to file a petition for allocatur nunc pro tunc were then appropriately denied by the Pennsylvania Supreme Court. Petitioner's Appendix G. The result of the Petitioner's own failure to file a *timely* petition for allocatur

before Pennsylvania's highest court creates a case over which your Honorable Court has no jurisdiction. No party can claim any knowledge concerning how the Pennsylvania Supreme Court would have responded to a timely petition for allocatur, as a timely petition was never filed. The situation is analogous to cases in which your Honorable Court refused to assume that an application for review to a state's highest court would be refused, where such an application had not been filed. *See, e.g., Stratton v. Stratton,* 239 U.S. 55, 56 (1915)("[T]his simply invites us to assume jurisdiction by exercising an authority which we have not; that is, by indulging in conjecture as to what would or would not have been the judgment of the supreme court of Ohio if it had been called upon to exert the discretion vested in it by state laws."); *Fisher v. Perkins,* 122 U.S. 522, 526 (1887) ("Certainly it would not be claimed that a judgment of the [intermediate appellate] court could be reviewed by this court . . . before an application had been made in proper time for the allowance of an appeal, and the application refused for some sufficient reason"). Petitioner's failure to make a timely filing before the Supreme Court of Pennsylvania is the conceptual equivalent of no filing at all, and precludes review by your Honorable Court.

Petitioner makes the misleading claim that his appeal was untimely only because the Commonwealth Court's "[n]otice of denial of reconsideration was never sent to the pro se Petitioner." Petition, p. 3. In actuality, the Petitioner had released his counsel, and then failed to file an entry of appearance *pro se*. Under Pennsylvania Rules of Appellate Procedure, the appellate court must grant leave for previous counsel to withdraw his appearance. Pa.R.A.P. 907(b). Petitioner did not, and does not allege, that he or his counsel requested leave to withdraw counsel's appearance. As a result, the Commonwealth Court's denial of the so-called "*pro se*" motion for reconsideration was sent to the Petitioner's counsel

of record. As this counsel was no longer representing Petitioner, and indeed, had no knowledge of the motion, he simply filed it away. These facts are indicated by the affidavit procured by the Petitioner from his former counsel, attached as an exhibit to his nunc pro tunc petition before the Pennsylvania Supreme Court. Petition for Permission to File Allocatur Petition Nunc Pro Tunc, No. 211 E.D. Misc Docket 1995 (*denied*, Pa. December 20, 1995).

Petitioner certainly had knowledge of the entry of appearance requirements, as he has been recognized at trial and appellate levels as the most prolific litigator in the history of Chester County, Pennsylvania, the county from which the case springs. *Kennett Square v. Lal (Kennett Square II), supra*, 645 A.2d at 476. He is the holder of law degree, and the Commonwealth Court has previously recognized Petitioner's legal acumen, stating:

> The trial court noted that Appellant has a Ph.D. and a law degree, and the level of sophistication of his pleadings and his ability to manipulate the rules shows he was not a typical *pro se* litigator. Rather, he was more an unlicensed lawyer of considerable skill. (T.C. Opinion at 6, December 8, 1993.)

Kennett Square II, supra, 645 A.2d at 476, n.1.

The Petitioner failed, as a result of his own legal maneuverings, to file a timely petition for allocatur to the Pennsylvania Supreme Court. Your Honorable Court is therefore without jurisdiction to review the underlying decision of the intermediate appellate court. As a result the petition for certiorari should be denied for want of jurisdiction.

II.

ASSUMING JURISDICTION EXISTS, PETITIONER HAS RAISED NO LEGITIMATE CONSTITUTIONAL ISSUES, AND THE PETITION FOR CERTIORARI SHOULD THEREFORE BE DENIED.

If, despite the Petitioner's failure to seek timely review by the Pennsylvania Supreme Court, the petition for certiorari is considered properly before your Honorable Court, the Petitioner nonetheless has failed to state a single valid constitutional argument meriting certiorari. The Petitioner's arguments will be addressed in the order raised by his Petition.

A. Fourteenth Amendment—Adequacy of Respondent's Property Maintenance Ordinance.

The Borough's property maintenance code is exactly the type of municipal ordinance specifically authorized by the Pennsylvania Legislature and its enforcement relates directly to the health, safety and general welfare of the community. Use of the property maintenance code is consistent with the practice of municipalities nationwide and provides many of the minimum housing standards designed to protect and benefit residents of the community.

The property maintenance code, adopted within the police power of the Borough, is presumed to be in furtherance of the public health, safety, morals and welfare, *Phillips v. Borough of Folcroft*, 403 A.2d 194 (Pa. Cmwlth. 1979), and the burden is on the Petitioner to overcome this presumption. Contrary to Petitioner's argument, the evidence does not establish that the Borough's property maintenance code is unreasonable or that is was oppressively enforced.

The necessity of regulations respecting the repair of buildings in crowded centers has been long recognized. *McQuillin Mun. Corp*, §24.504 (3d Ed). The enactment and enforcement of such codes constitutes a legitimate governmental function, the primary purpose of which is to secure to the municipality as a whole the benefits of a well ordered municipal government and to protect the health and secure the safety of occupants of buildings. *McQuillin Mun. Corp*, §24.507 (3d Ed).

Petitioner rests his averment that the Borough's property maintenance code is unreasonable due to the alleged "minimal" nature of the violations, but cites no pertinent law in support of this argument. In fact, the cases utilized in support of the argument include one where an ordinance requiring the installation of bathroom facilities was deemed confiscatory due to the excessive costs of making the required improvements. *Dente v. Mt. Vernon*, 50 Misc. 2d 983, 272 N.Y.S. 2d 65 (1966). There is no evidence of record in the case *sub judice* regarding the cost of repairs and one would assume that if the violations were *de minimis*, as Petitioner argues, the cost would not be excessive. Additionally, the vast majority of states recognizes the constitutionality of statutes which establish minimum property maintenance standards. *See State v. Schaffel*, 229 A.2d 552 (Conn. Cir. 1966); *Louisville v. Thompson*, 339 S.W. 2d 869 (Ky. 1960); *St. Louis v. Nash*, 260 S.W. 985 (Mo. 1924); *Tenement House Department v. Moeshen*, 72 N.E. 231 (N.Y. 1904), *aff'd*, 203 U.S. 583 (1906); *Richards v. Colombia*, 88 S.E. 2d 683 (S.C. 1955); *Spear v. Ward*, 74 So. 27 (Ala. 1917); *Chicago v. Miller*, 188 N.E. 2d 694 (Ill. 1963), *appeal dismissed*, 375 U.S. 11 (1963); *R.S. Construction Company v. Baltimore*, 309 A.2d 629 (Md. 1973); *Newark v. Charles Realty Company*, 86 A.2d 33 (N.J. Super. 1952); *Pickwick Realty Co. v. Housing Appeals Board*, 12 Ohio Misc. 245, 232 N.E. 2d 427 (Ohio 1965); *Paquette v. Fall River*, 155 N.E. 2d 775 (Mass. 1959).

Regardless of the law in other jurisdictions, the Pennsylvania Legislature has specifically directed boroughs to enact the type of ordinance which Petitioner challenges. Authority is found in 53 P.S. § 4104 which states:

> In order to promote the public health, safety, morals and general welfare, all . . . boroughs . . . in this Commonwealth are hereby authorized and empowered to enact and enforce suitable ordinances to govern and regulate the . . . repairs, occupation, . . . maintenance, sanitation, . . . ventilation, toilet facilities, use and inspection of all buildings and housing . . . . Such ordinances may adopt any standard building code . . . covering any or all the above items.

Statutory authority is also found in the Borough Code which states:

> Among the specific powers of the boroughs shall be the following . . . (24) *Building, Housing and Plumbing Regulations*: To enact and enforce ordinances relating to buildings and housing, their . . . repair and maintenance and all facilities and services in or about such buildings or housing . . . . Any such ordinance may be adopted by reference to a standard building code or housing code or to parts thereof . . . .

53 P.S. §46202(24).

Generally, an ordinance will not be considered so arbitrary as to be unconstitutional when the Pennsylvania Legislature has

specifically authorized it. *Henley v. Zoning Hearing Board of West Fallowfield Township*, 625 A.2d 132 (Pa. Cmwlth. 1992). The specific authorization cited above distinguishes the Borough's property maintenance code from the sanitary sewage disposal system ordinance found unauthorized in *Holland Enterprises, Inc. v. Joka*, 439 A.2d 876 (Pa. Cmwlth. 1982). Although Petitioner cites *Holland Enterprises, Inc.* in support of his argument, that case involved a municipality attempting to use only its general police power to justify an ordinance establishing regulations in an area already preempted by the Pennsylvania Legislature.

Petitioner's assertion that the issue of the repair and maintenance of his apartment buildings should be solely between himself and his tenants is also without foundation in the law. Were this assertion accepted, the Commonwealth Court would have to disregard the specific authorization of the Pennsylvania legislation and declare property maintenance regulations unauthorized throughout the state. Such a position is unsupportable. An ordinance enacted pursuant to express and specific legislative authorization may be declared void as unreasonable, arbitrary and impressive only in extreme cases, if at all. The discretion to authorize a municipality to enact certain ordinances is for the Legislature to decide. *McQuillin Mun. Corp.*, § 18.02 (3d Ed).

Although Petitioner argues that the property maintenance code adversely affects the legitimate use of his property and that it interferes with housing for "low and moderate income" persons, this case has nothing to do with exclusionary zoning and the record contains no evidence to support any allegation regarding the income of Petitioner's tenants. Petitioner's use of his apartment buildings as a multi-family tenement remains unchanged. Petitioner is simply prohibited from allowing these buildings to become dilapidated. The tenants, regardless of

their income, can only be benefited from the Borough's insistence that their landlord adequately maintain their homes.

Petitioner's further allegation that the Borough's enforcement of its property maintenance code is so oppressive as to be unconstitutional is also without merit. The record discloses that the Borough notified Petitioner of the outstanding violations and gave him several months to initiate repairs. Additionally, Petitioner was provided an appeal to the Borough Building and Fire Appeals Board prior to the issuance of any citations. Indeed, Petitioner has been provided with three separate evidentiary hearings on the subject violations prior to his appeal to the Commonwealth Court. It would have been far less reasonable for the Borough to allow the conditions it observed to remain uncorrected.

The trial record is devoid of any substantive evidence to support Petitioner's claim that the ordinance was selectively or discriminatorily enforced. (N.T. 6/7/94, pp. 127-132). Further, as noted by the Commonwealth Court, Petitioner has, without foundation, raised the issue of constitutionality of property maintenance ordinances as a mantra in various cases. *Lal v. Borough of Kennett Square (Kennett Square III), supra,* 665 A.2d at 19, *citing Kennett Square II, supra; Thornbury Township, supra.*

B. Eighth Amendment—Excessive Fines

Petitioners argument concerning excessive fines is also without merit. The Commonwealth Court properly recognized the rule:

> In response to Lal's attacks against the trial court's sentence as excessive, this court stated in *Kennett Square I:*

> [T]he trial court should weigh all mitigating and aggravating factors and arrive at an appropriate sentence that is consistent with the protection of the public and the gravity of the offense .... Considerations should include the history and character of the defendant, the nature and circumstances of the crime .... Finally, if a sentence imposed is within the statutory limits, there is no abuse of discretion unless the sentence is manifestly excessive so as to inflict too severe a punishment.

Borough of Kennett Square v. Lal (Kennett Square III), supra, 665 A.2d at 19, *quoting Kennett Square I, supra,* 643 A.2d at 1175 (alterations in original). The rule stated mirrors 42 Pa.C.S.A. § 9726(a), which authorizes fines as a sentencing penalty, and allows a court to impose fines "having regard to the nature and circumstances of the crime and to the history and character of the defendant . . ." In this case, the sentencing court was knowledgeable that the Petitioner had committed over 225 housing and building code violations. Borough's Pre-Sentencing Memorandum. Such previous violations have been deemed relevant at the sentencing of this particular defendant. *Commonwealth v. Lal,* 627 A.2d 281 (Pa. Cmwlth. 1993), *appeal denied,* 647 A.2d 512 (1993). Applying the rule to the instant case, the Commonwealth Court stated in *Kennett Square III*:

> Judge Gavin reduced the maximum fine of $24,000 imposed by the district justice to $14,550 after properly considering the entire record and Lal's history. Absolutely

> no judicial abuse of discretion has been demonstrated by Lal in this context, nor has he otherwise shown any basis for his claims of violation of the Excessive Fines Clause of the Eight Amendment.

Kennett Square III, supra, 665 A.2d at 19.

As to the Petitioner's attempt to draw the separate equity case into his "excessive fines" calculus, the Respondent notes that the so-called "fines" in that case, *Borough of Kennett Square v. Lal (Kennett Square II), supra,* 645 A.2d 474, actually consisted of an order by which an agent, *appointed to act on Petitioner's behalf,* would direct rental income in the following order: mortgage payments, operating expenses, repairs, creation of a maintenance escrow fund, with remainder to Petitioner. This directed rental income accrued to the benefit of Petitioner and his properties, and is not a "fine" at all. *See* Trial Court Order of December 8, 1993, Petition Appendix F. Despite Petitioner's attempts to mischaracterize the purpose of the funds allocated by the agent, the trial court's order speaks for itself.

C. Fifth Amendment—Double Jeopardy

The Commonwealth Court immediately recognized Petitioner's double jeopardy argument as "wholly frivolous." *Borough of Kennett Square v. Lal (Kennett Square III), supra,* 665 A.2d at 18. The court stated:

> Proceeding in equity for injunctive relief and for the appointment of an agent to manage Lal's property does not preclude the filing of summary offenses for violation of the ordinance, punishable by fine.

> Moreover, any contention that double jeopardy attaches because the Borough proceeded in equity to secure appointment of an agent and initiated the summary citation proceedings as well is wholly frivolous. The Fifth Amendment double jeopardy clause prohibits a *second* criminal punishment for the *same* criminal offense. *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938)

Id. Other Pennsylvania courts have similarly held that civil proceedings brought to address conduct which may be the basis for a criminal prosecution cannot violate the rule against double jeopardy. *Jordan v. Gore*, 431 A.2d 300 (Pa. Super. 1981); *Zanotto v. Commonwealth, Department of Transportation*, 475 A.2d 1375 (Pa. Cmwlth. 1984). Consequently, a double jeopardy challenge is inapplicable to the present circumstances.

D. Sixth Amendment—Right to Counsel

The Commonwealth Court correctly recognized that the trial court properly refused to grant Petitioner a third continuance to acquire counsel, and agreed further that the constitutional right to counsel did not attach in these proceedings. Consequently, Petitioner's argument on this issue must fail.

Despite Petitioner's practiced misapplication of constitutional law, it is clear that the protections of the state and federal constitutions with respect to representation of counsel apply only to situations where the possibility of imprisonment exists. *Borough of Kennett Square v. Lal, (Kennett Square I), supra*, 643 A.2d at 1175-1176; *Thornbury Township v. Lal,*

supra. This right does not apply where, as here, a defendant is prosecuted for a summary offense punishable only by a fine. In *Bacik v. Commonwealth*, 434 A.2d 860 (Pa. Cmwlth. 1981), *appeal dismissed*, 456 U.S. 967 (1982), the Commonwealth Court found that the right to counsel did not apply to a defendant convicted of violating a township ordinance where the penalty was a fine.

Although Petitioner attempts to distinguish the circumstances in this case from those in *Kennett Square I, supra*, his argument that he could be imprisoned for contempt if he fails to pay fines does not present distinguishing circumstances and is unpersuasive. These summary citation proceedings are wholly separate from a hypothetical future civil contempt hearing should Petitioner choose not to abide by the order of court sentencing him to pay fines. Such a contempt proceeding was also possible in *Kennett Square I, supra*. Under such circumstances, imprisonment would only occur due to Petitioner's recalcitrance in the face of a direct court order and not as a result of a penalty for the property maintenance violations.

The Commonwealth Court recognized that the right to counsel argument was addressed at length in *Kennett Square I, supra*, and concluded:

> Accordingly, no Sixth Amendment rights attach to the instant case. The contention that imprisonment may result upon a finding of contempt for failure to pay a fine does not distinguish Lal's case from well-established law. Any possibility of imprisonment in that event would result not from a violation of the Building Code, but rather from a separate and distinct act of contempt on Lal's part

upon a finding by the court.

Kennett Square III, supra, 665 A.2d at 19.

Petitioner's further allegation that the lower court should have granted him a third continuance is equally without merit. When the court convened on June 6, 1994, Petitioner's continuance motion was based upon his failure to obtain counsel. The court, however, had informed him on two prior occasions that he must proceed without counsel if he did not acquire counsel before trial. (N.T. 4/13/94, pp. 10-11; N.T. 4/29/94, pp. 8-11). Petitioner had given neither the Borough nor the Court prior notice that he would be seeking a continuance as required by Pa. R. C. P. 216(C),[4] and failed to meet any of the criteria listed in Pa. R. C. P. 216(A).[5] Under these circumstances, the lower court's decision to proceed with trial was not an abuse of discretion.

The Court has traditionally had wide discretion to grant or deny a continuance request. Only in extreme cases does the denial of a continuance motion constitute a denial of due process. *Commonwealth v. Howard,* 353 A.2d 438 (Pa. 1976). A trial court's denial of a continuance request will not be reversed without a palpable and prejudicial abuse of discretion. *Commonwealth v. Kizbach,* 373 A.2d 118 (Pa. Super. 1976); *Commonwealth v. Smith,* 275 A.2d 98 (Pa. 1971). Because the decision to grant or refuse a continuance is an inherent power of the trial court and is a discretionary matter, the exercise of this discretion will not be overturned except upon a clear showing of

---

4. Chester County, Pennsylvania Rules of Criminal Procedure (C. C. R. Crim.P. 301(a)(1)) state that Pa. R. C .P. 216 shall be followed with respect to continuance requests in Chester County criminal cases.

5. The grounds for continuance include, *inter alia,* agreement of all parties, illness, or special ground allowed in discretion of court.

abuse. *Re: Right of Way for Legislative Route 1023*, 406 A.2d 819 (Pa. Cmwlth. 1979). A court's use of this discretion is not altered even where the reason cited by the Petitioner is to obtain counsel. The right to choose counsel is not absolute and must be balanced against the public need for efficient and effective administration of criminal justice. *Commonwealth v. Gray*, 608 A.2d 534 (Pa. Super. 1992). The right to choose counsel must be exercised at a reasonable time and at a reasonable matter. *Commonwealth v. Novak*, 150 A.2d 102 (Pa. 1959).

Unfortunately, there is also evidence in the record to indicate that Petitioner's third continuance request was not made in good faith. By the time Petitioner made this last continuance request, it was clear that he had taken time to develop a variety of meritless technical objections leading the court to conclude that Petitioner was simply flaunting his knowledge of the law. (N.T. 6/6/94, pp. 18-19). This type of conduct is relevant to the issue of continuance since a court must not allow a defendant to subvert judicial proceedings or cause undue delay by requesting the designation of a certain lawyer to represent him. Nor must a court honor a belated continuance request made not in good faith but as a transparent ploy for delay. *United States v. Rankin*, 779 F.2d 956 (3d Cir. 1986).

E. Fourteenth Amendment—Due Process/Election of Remedies

Finally, Petitioner makes the specious argument that the Respondent having commenced a separate and distinct equity action, was barred from prosecuting the summary offenses instantly at issue. *Citing Kennett Square I, supra,* the Commonwealth Court recognized this argument as "totally devoid of merit." *Kennett Square III, supra*, 665 A.2d at 17.

Indeed, the doctrine of election of remedies is inapplicable to this matter since the actual circumstances, relief prayed for and causes of action in this municipal violation proceeding and the equity case are distinct. The property maintenance code violations committed by Petitioner in these consolidated cases occurred on the specific dates of March 24 and 27, 1993, notwithstanding Petitioner's knowledge of their existence for at least three months. These continuing violations necessitated the institution of summary criminal proceedings, where the only remedies permitted were fines, 53 P.S. §§ 48301, 48308, and the burden of proof was beyond a reasonable doubt. *See Borough of West Chester v. Lal,* 426 A.2d 603 (Pa. 1981).

In contrast, the equity action, referred to by Petitioner, constituted a civil proceeding, 53 P.S. § 46202(24), brought in response to the failure of a multiplicity of legal actions to provide an adequate incentive for Petitioner to properly maintain his apartment buildings. In equity, the Borough alleged irreparable harm and sought a court order appointing a local agent to assist Petitioner in bringing the buildings up to code and the creation of an escrow fund to fund future maintenance.

Generally, a party may have as many remedies as the law gives provided that they are consistent. To be regarded as inconsistent, the remedies in question must be different means of adjudicating the same issues, P.L.E., *Election of Remedies,* §§ 3 and 4, and pursuit of one remedy necessarily implies the negation of the other. *Nuside Metal Products, Inc. v. Eazor Exp. Inc.,* 152 A.2d 275 (Pa. Super. 1979); *Pittsburgh Union Stockyards Co. v. Pittsburgh Joint Stockyards Co.,* 163 A. 668 (Pa. 1933).

A specific method of determining whether both actions are the same and an election of remedies warranted is to determine

if the proof necessary to support both actions is the same or different. Where the proof is different, no election is necessary. *Simpson v. Equitable Life Assurance Society of the United States*, 193 A. 309 (Pa. Super. 1937). Certainly, using this test, the municipal violation citations and the equity action are different matters. The former is a criminal proceeding necessitating proof beyond a reasonable doubt of various elements relating to the specific underlying violations. The latter is a civil proceeding requiring a lower burden of proof to demonstrate that a multiplicity of legal actions has failed to remedy an irreparable harm. The citation proceedings involved penalties in the nature of fines while the equity action sought a court order appointing a local agent and establishing an escrow fund for the future repair and maintenance of the subject apartment buildings.

In *Commonwealth, Department of Environmental Protection v. Pennsylvania Power Company*, 384 A.2d 273 (Pa. Cmwlth. 1978), *rev'd and remanded on other grounds*, 490 Pa. 399, the Commonwealth Court addressed the doctrine of election of remedies and found that an equity action brought to compel compliance with the Commonwealth's air pollution regulations was not inconsistent with a later penalty action brought by the DEP for numerous specific violations of the DER pollution control regulations. These actions were deemed to be supportive of each other, not repetitive or inconsistent, or in violation of the doctrine of election of remedies. Like the DEP in *Commonwealth, Department of Environmental Protection v. Pennsylvania Power Company*, the Borough instituted the action *sub judice* seeking penalties due to Petitioner's specific violations and instituted the equity action to compel future compliance with the Borough's property maintenance code. *See also, Pawk v. Commonwealth, Department of Environmental Resources*, 395 A.2d 692 (Pa. Cmwlth. 1978). Due process or equal protection theories are simply not implicated.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied for want of jurisdiction, or denied for lack of substantive merit.

Respectfully submitted,

JOHN L. HALL
Counsel of Record
GAWTHROP GREENWOOD & HALSTED
A Professional Corporation
Attorneys for Respondent
119 North High Street
West Chester, PA 19381-0562
(610) 696-8225